DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
CITY AND COUNTY OF DENVER, Plaintiff, v. STATE OF COLORADO; COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Defendants.	▲**COURT USE ONLY**▲
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PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS	

Plaintiff, the City and County of Denver ("City"), through undersigned counsel, respectfully responds in opposition to the State of Colorado's and Colorado Department of Public Health and Environment's ("Department," collectively "Defendants") Motion to Dismiss ("Motion").

The Motion

The Motion seeks dismissal pursuant to C.R.C.P. 12(b)(1) and argues this Court lacks subject matter jurisdiction because the City did not timely file an action for judicial review under

the Colorado Administrative Procedure Act (APA), C.R.S. § 24-4-101, *et seq.* However, the Motion is deficient for two primary reasons: First and foremost, these same parties entered into a Consent Decree following litigation involving the same issues raised by the City's Complaint ("Complaint"). The Consent Decree governs here, and Defendants are not free to ignore it and violate it under the cover of the APA. Second, the Department's characterization of its October 2017 letter as a final agency action is inaccurate. It ignores the fact that the parties engaged – and are engaging – in substantive and multiple communications and meetings over the issues raised in the Complaint following the October 2017 communication.

Introduction

In 2003, the City filed suit against Defendants challenging Defendants' hazardous substance response fund ("HSRF") regulations. The City's 2003 Complaint alleged, among other things, that the Colorado Board of Health lacked statutory authority to promulgate the HSRF regulations and lacked authority to adopt regulations that govern the expenditure of a locally imposed fee. (*See* ¶ 9, Consent Decree attached as **Ex. B to Motion**).[1] The City was concerned that Defendants would unreasonably deny reimbursement of costs incurred by the City at Superfund sites listed on the National Priority List, in violation of Defendants' legal obligation under C.R.S. § 25-15-104.5(2)(a.5), which governs when a local government such as the City may retain money it collects to spend on response activities at Superfund sites. The City was specifically concerned with the method by which the Department would approve or deny HSRF reimbursement for the City's future response costs. As a direct result of that litigation, the City and Defendants entered certain Consent Decree and Final Judgment, dated October 27, 2003, in case number 03CV3109 ("Consent Decree") (**Ex. B to Motion**).

[1] The Consent Decree is referred herein as "Ex. B to Motion" since it was attached as Exhibit B to Defendants' Motion to Dismiss.

The matter before this Court is fundamentally about Defendants' failure to comply with the Consent Decree. An essential part of the Consent Decree was the agreement by the parties to identify nine specific categories of response activities that were to be presumed valid by Defendants. (*See* ¶ 15 of **Ex. B to Motion**). Defendants also agreed, and were ordered by this Court, not to unreasonably withhold approval of these nine categories of costs. (*See* ¶ 15(c) of **Ex. B to Motion**). Despite Defendants' legal obligations in the Consent Decree, the Department is now unreasonably withholding approval of the City's costs, are operating without regard to a court order, and are attempting to render a substantive provision in the Consent Decree toothless. The Department's justification for denying the City's written request – that the City wanted to use the funds to pay for its infrastructure improvements – is unreasonable and is precisely the type of action that motivated the 2003 litigation and the resulting Consent Decree (Motion to Dismiss at page 4). The costs for which the City requests reimbursement are squarely within the categories of response activities that the parties agreed would not be unreasonably withheld by the Department under paragraph 15 of the Consent Decree. Most notably is the category under ¶ 15(c)(2) – "any response activities performed under an order issued to Denver by the EPA. . ." Here, as the Motion acknowledges and the Complaint details, the City entered into that certain Administrative Settlement Agreement and Order on Consent for Removal Action between the City and the U.S. Environmental Protection Agency, dated July 1, 2015 (the "2015 AOC"), whereby the City was required to complete certain response activities at the Vasquez Boulevard/I-70 Superfund Site. (Complaint at ¶¶ 18-19). Despite this, the Department characterizes those response activities as "infrastructure improvements" and now ignores the clear language of the Consent Decree.

In addition, Defendants disingenuously assert that the Department made a final agency decision in October of 2017, despite the fact that the Department and Defendants' counsel proceeded to have a number of meetings and communications with City and City's counsel between October 2017 and September 2018. During those meetings and communications, City provided additional documentation that the Department requested in order to better understand City's response costs. This included a line-by-line presentation of the City's costs and their relation to specific work required by EPA in the 2015 AOC. Now, despite nearly a year of ongoing meetings and communications regarding response costs, Defendants argue for the first time that the Department made a final decision in October 2017, and are ignoring the Department's subsequent actions and involvement with City on these issues.

Standard of Review

Under C.R.C.P. 12(b)(1), a trial court determines subject matter jurisdiction by examining the substance of the claim based on the facts alleged and the relief requested. *State ex. Rel. Colo. Dep't of Health v. I.D.I., Inc.*, 642 P.2d 14 (Colo. App. 1981). The City has the burden of proving jurisdiction. *Trinity Broad, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). A trial court may consider any competent evidence pertaining to a 12(b)(1) motion. *Lee v. Banner Health*, 214 P. 3d 589, 593 (Colo. App. 2009)(*citing Trinity*, 848 P. 2d at 924). Because Rule 12(b)(1) permits a trial court to make its own factual findings in determining its subject matter jurisdiction, it permits the trial court to hold an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001)(citing cases omitted).

Argument

I. This Court has Jurisdiction

A court has subject matter jurisdiction to hear a case "if 'the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority.'" *Horton v. Suthers*, 43 P.3d 611, 615 (Colo. 2002)(quoting *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986). Here, the Court's authority is derived from C.R.S. § 13-1-114(1)(c), C.R.C.P. Rule 57, and C.R.S. § 13-51-101 *et seq.* Thus, this Court has subject matter jurisdiction in this matter.

Pursuant to C.R.S. § 13-1-114(1)(c), "[e]very court has power to compel obedience to its lawful judgments, orders and process and to the lawful orders of its judge out of court action or proceeding therein." The Consent Decree is a settlement agreement and court order that is subject to continued judicial policing by this Court. *E.g.*, *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). The City's Complaint alleges that Defendants have not complied with the Consent Decree and City seeks a declaration of City's rights and Defendants' obligations therein. This Court clearly retains jurisdiction to enforce the Consent Decree, an order entered in this very Court. *E.g.*, *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 285-86 (D.C. Cir. 1993)(citing "well established principle that a trial court retains jurisdiction to enforce consent decrees").

This Court also has jurisdiction under C.R.C.P. Rule 57 and the Uniform Declaratory Judgments Law, C.R.S. § 13-51-101, *et seq.* This Court has the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. C.R.C.P. Rule 57(a); *see* C.R.S. § 13-51-105. "Any person interested under a...written instrument, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a...contract...may have determined any question of construction or validity arising under the

instrument...[or]...contract and obtain a declaration of rights, status, or other legal relations thereunder." C.R.C.P. Rule 57(b); *see also* C.R.S. § 13-51-106.

The purpose of the Uniform Declaratory Judgments Law is to afford relief from the uncertainty surrounding legal rights and relations. *See* C.R.S. § 13-51-102; *Cmty. Tele-Communications v. Heather Corp.*, 677 P.2d 330, 334 (Colo. 1984). It is remedial in nature and should be liberally construed and administered. *Id.* The state legislature enacted the Uniform Declaratory Judgments Law to establish a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on the validity or interpretation of some written instrument of law. *Toncray v. Dolan*, 593 P.2d 956, 952 (Colo. 1979).

II. The Consent Decree Governs

a. The Consent Decree is a Written Instrument

The Consent Decree is a negotiated agreement that was entered by the parties in this Court. The Consent Decree is also a written instrument documenting a judgment of this Court for purposes of enforcement. *See Sinclair Oil Corp. v. Scherer*, 7 F.3d 191, 193 (10th Cir. 1993). This Court, as the court of record, has the authority and jurisdiction under C.R.C.P. Rule 57 and C.R.S. § 13-51-105 to declare rights, status, and other legal relations irrespective of whether further relief is or could be claimed by the City.

The interpretation and scope of the Consent Decree is discerned by general contract principles. *Sinclair*, 7 F.3d. at 194. Thus, a reviewing Court looks to the language of the Consent Decree and as it is written. *Id.* City, thus, rightfully seeks a declaration from this Court to affirm and uphold the meaning of the language in the Consent Decree.

b. The Consent Decree was the Product of Litigation

The Consent Decree was negotiated by the parties to resolve a number of issues, including the issue currently before this Court. C.R.S. § 26-15-104.5(2)(a.5) states, in relevant part:

> "one hundred percent of the moneys collected...from persons disposing of solid waste at an attended solid waste disposal site where a local government solid waste disposal fee is imposed to fund hazardous substance response activities at sites designated on the national priority list pursuant to the federal act *shall* be transmitted to the owner of the solid waste disposal site to the extent that the moneys are used to fund the response activities at the sites on the national priority list."

(emphasis added). The legislature's use of the term "shall" indicates a mandatory requirement. *See People v. Garcia*, 382 P.3d 1258, 1261 (Colo. App. 2016).

Despite the state legislature's explicit reimbursement mandate, Defendants promulgated regulations establishing a requirement that a local jurisdiction must obtain approval from Defendants to use or retain for future use, the solid waste user fee to fund response activities at sites on the national priority list. Solid Waste User Fee, Rule 1.7.4. (C)(1). One of the City's concerns in 2003 was that Defendants would, through their regulations, create obstacles for municipalities like the City from obtaining reimbursement that the state legislature clearly contemplated in C.R.S. § 26-15-104.5(2)(a.5). This was the very reason for the City's 2003 lawsuit.

As a result of this 2003 lawsuit, the parties agreed to include language in section 15(c) of the Consent Decree that establishes nine categories of response activities performed by City at national priority list sites that shall be "presumed valid" by the Defendants. Consent Decree, section 15(c) ("To limit future disputes, the following categories of response activities performed

by Denver at NPL Sites are presumed valid.").[2] Section 15(c) of the Consent Decree also states, "[t]he Department will not unreasonably withhold approval of costs for such activities, and Denver reserves its rights and defenses in the event the Department determined that a cost is not allowable." (**Ex. B. to Motion** ¶ 15(c)). The Department is, therefore, legally obligated by this Court not to unreasonably withhold approval of costs for the nine categories of response activities. The inclusion of the "presumed valid" and the "Department will not unreasonably withhold approval of costs for such activities" language in section 15(c) of the Consent Decree memorialized the parties' intent to shift the burden on Defendants as it relates to any denial of costs for the nine categories of response activities. Despite this clear language, Defendants have violated the Consent Decree by unreasonably withholding approval for response categories that fall within the delineated nine categories.

c. The Consent Decree is not Subject to the APA

Instead of complying, Defendants are now endeavoring to discard an entire section of the Consent Decree, and the obligations imposed by this Court on Defendants therein, under the assertion that City should have appealed the Department's allegedly final reimbursement decision in accordance with the APA. Defendants argue that City should have appealed the Department's alleged final agency action under an APA arbitrary and capricious standard that was clearly not contemplated and agreed upon by the parties in section 15(c) of the Consent Decree. Defendants cite a number of cases for the proposition that a party's failure to timely file for judicial review under the APA constitutes a jurisdictional bar to later review of the agency's decision. However, none of the cases Defendants cite involve a consent decree and final judgment, and it is well established that administrative remedies may be insufficient where the

[2] "Presumption" means "[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." Black's Law Dictionary, Seventh Edition. "A presumption shifts the burden of

matters in controversy consist of questions of law. *Horrell v. Dep't of Administration*, 861 P. 2d 1194, 1197 (Colo. 1993). The City seeks a declaration and enforcement of a Consent Decree that was entered into and ordered by this Court. The APA does not abrogate a consent decree such as this, and there is no authority that stands for that untenable position.

Defendants have selectively cited certain provisions of the Consent Decree to argue that the parties were merely preserving the normal course and that the Department retained the ability to deny reimbursement costs without regard to the mandatory language of the Consent Decree. (*See* ¶ D of Motion, pages 11-12). However, as discussed above, it is clear from the language of the Consent Decree that these issues were to be governed by the Consent Decree and not by agency fiat. Paragraph 15 of the Consent Decree was included for a reason and the presumptively valid categories, such as those activities performed pursuant to an agreement with the EPA, cannot simply be denied by the Department.

Courts retain jurisdiction to enforce consent decrees and final judgments entered in their court. *See Williams*, 720 F.2d at 920. To be clear, there is a difference between seeking a declaratory judgment of a party's legal rights and obligations pursuant to an existing order of the court (e.g., the matter before this Court) and seeking a declaratory judgment of an agency decision (e.g., the cases cited by Defendants). Put simply, the APA is inapplicable to a court's review and enforcement of the terms of a consent decree. *Cf. Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 834 F.Supp.2d 1004, 1013-14 (D. Haw. 2011), *aff'd*, 672 F. 3d 1160 (9th Cir. 2012)(analyzing, in relevant part, the inapplicability of the Federal Administrative Procedure Act to consent decrees entered into by a federal agency). A consent decree is a judicial act, rather than an agency act. *Id.* at 1013. Nothing in the APA contemplates its

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production or persuasion to the opposing party, who can then attempt to overcome the presumption." *Id.*

applicability to a judicial act, and, therefore, the APA is inapplicable to this Court's present jurisdictional inquiry. *See id.* at 1014.

Defendants also disregard the fact that a declaration of the parties' respective rights and obligations in the Consent Decree will help provide clarity to both parties to resolve the present issue and similar issues that may arise relating to future response activities. Specifically, the City will likely incur additional response costs that are reimbursable under C.R.S. § 25-15-104.5(2)(a.5), and that fall within the nine categories of costs presumed valid in the Consent Decree. Rather than having to relitigate this issue again in the future, the City wishes to obtain a declaration by the Court clarifying the parties' rights and obligations under the Consent Decree. This is precisely the province of this Court to determine under C.R.C.P. Rule 57 and the Uniform Declaratory Judgments Law, C.R.S. § 13-51-101, *et seq.*

III. The Department's October 2, 2017 Letter was Not a Final Agency Action

The Department's letter dated October 2, 2017, was not a final agency action. Therefore, even if the APA did apply, the City's decision not to appeal the October letter did not trigger a jurisdictional bar that precludes this Court from granting the City relief in this matter.

The City agrees with Defendants' definition of an "action" under C.R.S. § 24-4-102(1). The City also agrees with Defendant that "for an agency action to be final and subject to judicial review, the action must (1) mark the consummation of the agency's decision-making process and not be merely tentative or interlocutory in nature, and (2) constitute an action by which rights or obligations have been determined or from which legal consequences will flow." *Chittenden v. Colorado Bd. Of Social Work Examiners*, 292 P.3d 1138, 1143 (Colo. App. 2012); *West Colorado Motors LLC v. General Motors LLC*, 411 P.3d 1068, 1076 (Colo. App. 2017).

However, "although a quasi-judicial decision may completely determine the rights of the parties and end the particular action, the existence of such a final decision, in and of itself, does not bar the quasi-judicial body from reopening the action on its own motion." *Citizens for Responsible Growth v. RCI Dev. Partners, Inc.*, 252 P.3d 1104, 1107 (Colo. 2011). The Department, a quasi-judicial body, is not precluded from reconsidering and superseding its own final decision. See *id.* If a quasi-judicial body like the Department reconsiders a prior decision, then the earlier decision ceases to be final and "the superseding decision that ultimately ends the action…is subject to judicial review." *Id.*

Here, the City disagrees that the Department's October 2017 letter marked the consummation of the Department's decision-making process. Even if the Department intended it to be a final decision, it clearly reconsidered it, as is evidenced by the several subsequent meetings the Department had with the City throughout 2018 to obtain additional information to make a determination. Thus, Defendants' declaration that the October 2017 letter was a final agency action is disingenuous. Upon receipt of the Department's October 2017 letter, the City and the City's counsel contacted the Department and the Attorney General's Office to understand exactly what additional information or documentation the Department needed to evaluate the City's request.

For example, the City submitted a letter, dated February 5, 2018, clarifying that all of the costs for which the City is claiming reimbursement are covered under one or more of the nine categories agreed upon in the Consent Decree. **Ex. A**. The parties then began months of communications and meetings for the purpose of providing the Department the additional information and documentation it claimed it did not possess.

On August 14, 2018, the Department, through its counsel, contacted the City's counsel to schedule a meeting titled, "VB I70 HSRF meeting." **Ex. B**. On August 20, 2018, the City, through undersigned counsel, emailed Defendants' counsel memorializing the fact that the City's counsel and Defendants' counsel spoke, and that the Department sought additional information to confirm what costs were HSRF reimbursable. **Ex. C**.

The Department, through their undersigned counsel, responded on August 20, 2018, thanking the City for the additional information provided but adding, "my client needed more details than the line item budget. Specifically, the line items do not clearly identify that they relate to the VB I-70 superfund portion of the GLO. We also discussed the need to connect each line item to a requirement under the AOC." **Ex. D**.

The parties continued to share additional information and agreed to meet on September 20, 2018. In an email titled, "HSRF settlement communication," dated September 17, 2018, Defendants' counsel stated, in relevant part:

> CDPHE needs further clarification of the budget items requested for reimbursement...Please be prepared to provide details of the exact location in which the activities were performed. Since Globeville landing park is a much larger area than just OU2 we cannot accurately identify from the materials you provided which expenses for reimbursement are within the OU2 boundary. Please also be prepared to discuss the details for each line item, the descriptions do not provide enough detail to know what activity is being performed, if it is for the OU2 boundary area and exactly where the AOC requires such activity.

Ex. E. The City compiled the additional documentation requested by the Department and, during a two-hour meeting on September 20, 2018, the City gave a thorough presentation, detailing each line item and its specific link to work that the City is legally obligated to complete under the 2015 AOC.

Following the meeting on September 20, 2018, the Department informed the City that Department staff were scheduled to meet with Department executive management on

October 11, 2018, to discuss this matter "before we can provide a response from the Department" and that the Department would "let you [the City] know after the Department has a decision." **Ex. F**. On October 15, 2018, Defendants' counsel verbally informed the City's counsel that the Department did not believe the City's approval request was permissible. The City has not received any documentation in writing marking the consummation of the agency's October 15, 2018 decision-making or constituting an action by which rights or obligations have been determined or from which legal consequences will flow.

The City was at all times under the impression that the purposes of the communications and meetings between the parties from October 2017 through October 15, 2018 were good faith efforts by both parties to provide the Department the additional documentation they requested. Now, following 12 months of meetings and communications between the parties, Defendants are attempting to pull the proverbial rug out from under the City by arguing that the Department made a final agency decision in October of 2017 and that the many subsequent communications between the parties were of no significance.

The Department clearly reopened and reconsidered the October 2017 allegedly final decision, as evidenced by the Department's subsequent actions. Furthermore, the Department has not made a final agency action because the Department has not met the very requirements Defendants identified in their Motion to Dismiss following the last meeting of the parties on September 20, 2018.

IV. Conclusion

Therefore, the City respectfully requests that this Court deny Defendants' Motion to Dismiss because this Court has jurisdiction to grant the City relief under C.R.C.P. Rule 57, C.R.S. § 13-51-105, and C.R.S. 13-1-114(1)(c). Additionally, to the extent that the APA has any

preclusive effect on this Court's jurisdiction, the Department has not made a final agency action and, therefore, this Court is not barred from granting the City relief.

Respectfully submitted this 9th day of January 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2019, a true and correct copy of the foregoing was filed and served the following parties:

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In accordance with C.R.C.P. 121 §1-26(7) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.